84-1519

No.

Office-Supreme Court, U.S.
FILED
MAR 25 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REX E. LEE
Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

KENNETH M. RAISLER
General Counsel

PAT G. NICOLETTE
Deputy General Counsel

WHITNEY ADAMS
Deputy General Counsel

NANCY E. YANOFSKY
Attorney
Commodity Futures Trading Commission
Washington, D.C. 20581

31pp

QUESTION PRESENTED

Whether the Commodity Futures Trading Commission, which adjudicates, subject to judicial review, claims for money damages brought against commodities brokers by customers alleging a violation of the Commodity Exchange Act, is precluded by Article III from entertaining the broker's state law counterclaim arising out of the same transaction or occurrence, when the customer could have brought his claim in an Article III court in the first instance but chose to proceed before the CFTC instead.

PARTIES TO THE PROCEEDING

The Commodity Futures Trading Commission adjudicated the claims of the parties in the administrative proceeding and was an appellee in the court of appeals. William T. Schor and Mortgage Services of America were complainants in the administrative proceeding and appellants in the court of appeals. ContiCommodity Services, Inc. and Richard L. Sandor were respondents in the administrative proceeding and appellees in the court of appeals.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constituiton, satutory provisions, and regulations involved	2
Statement	2
Reasons for granting the petition	10
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Alexander v. *Hillman*, 296 U.S. 222	22
Chemical Manufacturers Ass'n v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985)	15
Collins v. *Foreman*, 729 F.2d 108, cert. denied, No. 83-1616 (Oct. 1, 1984)	23
Crowell v. *Benson*, 285 U.S. 22	5, 24, 25, 26, 27
Fields v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890	23
Friedman v. *Dean Witter & Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307 (CFTC Nov. 13, 1981)	11
Gairola v. *Virginia Department of General Services*, 753 F.2d 1281	23
Geras v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037	23
Goldstein v. *Kelleher*, 728 F.2d 32, cert. denied, No. 84-5 (Oct. 1, 1984)	23
Heckers v. *Fowler*, 69 U.S. (2 Wall.) 123	23
Heckler v. *Mathews*, No. 82-1050 (Mar. 5, 1984)	18
Hirk v. *Agri-Research Council, Inc.*, 561 F.2d 96	20
Katchen v. *Landy*, 382 U.S. 323	22

Cases—Continued: Page

Kimberly v. *Arms*, 129 U.S. 512 23
Lehman Bros. Kuhn Loeb Inc. v. *Clark Oil & Refining Corp.*, 739 F.2d 1313, cert. denied, No. 84-519 (Jan. 14, 1985) 23
McElrath v. *United States*, 102 U.S. 426 ..... 21, 22
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Curran*, 456 U.S. 353 ..... 2, 6, 16, 19, 28
Misasi v. *Paine, Webber, Jackson, & Curtis, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,351 (CFTC Dec. 30, 1981) 12
Moore v. *New York Cotton Exchange*, 270 U.S. 593 13
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 25
Myron v. *Hauser*, 673 F.2d 994 13
North Haven Board of Education v. *Bell*, 456 U.S. 512 16
Northern Pipeline Construction Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 ..... 5, 6, 9, 22, 27, 28
Pacemaker Diagnostic Clinic, Inc. v. *Instromedix, Inc.*, 725 F.2d 537, cert. denied, No. 83-1873 (Oct. 1, 1984) 23
Palmore v. *United States*, 411 U.S. 389 25
Puryear v. *Ede's Ltd.*, 731 F.2d 1153, cert. denied, No. 83-1616 (Oct. 1, 1984) 23
Reconstruction Finance Corp. v. *Bankers Trust Co.*, 318 U.S. 163 26
Rice v. *Board of Trade*, 331 U.S. 247 14
Rosenthal & Co. v. *CFTC*, 614 F.2d 1121 12
United States v. *Dobey*, 751 F.2d 1140 23
Wharton-Thomas v. *United States*, 721 F.2d 922 23

Constitution, statutes, regulations and rules:

U.S. Const.:
Art. III ..... *passim*
Amend. VII 21
Administrative Procedure Act, 5 U.S.C. 553 15
Bankruptcy Act of 1978, Pub. L. No. 95-598, § 241(a), 92 Stat. 2668 5

Constitution, statutes, regulations and rules—Continued: Page

Commodity Exchange Act, 7 U.S.C. 1 *et seq.* 2
7 U.S.C. 2 26
7 U.S.C. 6b 2
7 U.S.C. (1976 ed.) 9 (§ 6(b)) 2
7 U.S.C. 9 (§ 6(b)) 2, 23
7 U.S.C. (1976 ed.) 12a(5) 14
7 U.S.C. 12a(5) 26
7 U.S.C. 13(b) 2
7 U.S.C. 13a 2
7 U.S.C. 13a-1 2
7 U.S.C. 13b 2
7 U.S.C. 15 13
7 U.S.C. (& Supp. V 1981) 18 (§ 14) 2, 3
7 U.S.C. 18 (§ 14) ..... *passim*
7 U.S.C. (Supp. V 1981) 18(a) 3, 16
7 U.S.C. (Supp. V) 18(b) 3, 16
7 U.S.C. 18(b) 17
7 U.S.C. (Supp. V 1981) 18(c) 3, 16
7 U.S.C. (1976 ed.) 18(d) 8, 16
7 U.S.C. (1976 ed.) 18(e) 3, 16
7 U.S.C. 18(e) 3, 23, 29
7 U.S.C. (1976 ed.) 18(f) 8, 16
7 U.S.C. (1976 ed.) 18(g) 8, 16
7 U.S.C. 25 6
Futures Trading Act of 1978, Pub. L. No. 95-405, § 21, 92 Stat. 875 16
Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 24
28 U.S.C. 636(c) 23
28 U.S.C. 1252 28
28 U.S.C. (Supp. II 1978) 1471 5
17 C.F.R.:
Section 1.55 26
Section 1.56 26
Section 12.19 ..... 2, 3
Section 12.23(b)(2) (1976) 3
Section 12.23(b)(2) (1983) 2
Section 180.3 26
Fed. R. Civ. P. 13(a) 12, 13

Miscellaneous: Page

CFTC Ann. Rep.:

1976 10
1977 10
1978 10
1979 10
1980 10
1981 10
1982 10
1983 10
1984 10

CFTC Reauthorization: Hearings on H.R. 5447 Before the Subcomm. on Conservation, Credit, and Rural Development of the House Comm. on Agriculture, 97th Cong., 2d Sess. (1982) 17

Committee on Revision of the Federal Judicial System, U.S. Dep't of Justice, *The Needs of the Federal Courts* (1977) 29

Commodity Futures Trading Commission Reauthorization: Hearings on S. 2109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry, 97th Cong., 2d Sess. (1982) 17

128 Cong. Rec. S13077 (daily ed. Oct. 1, 1982) 17

40 Fed. Reg. (1975):

p. 55666 14
p. 55667 14
pp. 55672-55673 14

41 Fed. Reg. (1976):

p. 3994 3
p. 4002 3

H.R. Rep. 93-975, 93d Cong., 2d Sess. (1974) 9, 14, 15

H.R. Rep. 97-565, 97th Cong., 2d Sess. Pt. I (1982) 17

Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157 (1953) 13

S. Rep. 95-850, 95th Cong., 2d Sess. (1978) 3, 28

S. Rep. 97-384, 97th Cong., 2d Sess. (1982) 17

In the Supreme Court of the United States

OCTOBER TERM, 1984

No.

COMMODITY FUTURES TRADING COMMISSION,
PETITIONER

v.

WILLIAM T. SCHOR, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Commodity Futures Trading Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-41a) is reported at 740 F.2d 1262. The orders of the court of appeals denying the petitions for rehearing (App., *infra*, 58a-61a) and the statement of two judges of the court of appeals dissenting from the denial of rehearing en banc (App., *infra*, 62a-64a) are unofficially reported at 2 Comm. Fut. L. Rep. (CCH) ¶ 22,409. The decision of the Administrative Law Judge (App., *infra*, 45a-55a) is unreported. The order of the Commission denying review of that decision (App., *infra*, 42a-44a) is unofficially reported at [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,823.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1984 (App., *infra*, 56a-57a). A petition for rehearing was denied on October 26, 1984 (App., *infra*, 58a-59a). On January 14, 1985, the Chief Justice extended the time in which to file a petition for a writ of certiorari to and including March 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTION, STATUTORY PROVISIONS, AND REGULATIONS INVOLVED

Article III of the United States Constitution; Section 14 of the Commodity Exchange Act, 7 U.S.C. (& Supp. V 1981) 18; the current version of Section 14, 7 U.S.C. 18; Section 6(b) of the Act, 7 U.S.C. (1976 ed.) 9; the current version of Section 6(b), 7 U.S.C. 9; and 17 C.F.R. 12.23(b)(2) (1983), now codified at 17 C.F.R. 12.19, are set forth at App., *infra*, 65a-82a.

STATEMENT

1. The Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, is " 'a comprehensive regulatory structure to oversee the volatile and esoteric futures trading complex.' " *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 355-356 (1982) (citation omitted). The CEA broadly prohibits fraudulent and manipulative conduct in connection with commodity futures transactions. 7 U.S.C. 6b, 13(b); see *Merrill Lynch*, 456 U.S. at 365-366. In 1974, Congress amended the CEA to "broaden[] its coverage" (*id.* at 365), to "increase[] the penalties for violation of its provisions" (*ibid.*), and to create the Commodity Futures Trading Commission (CFTC), which has broad powers to enforce the CEA. See, *e.g.*, 7 U.S.C. 13a, 13a-1, 13b.

At the same time that it created the Commission, Congress directed it to establish a "reparations" pro-

cedure for the adjudication of disputes between commodity brokers and their customers. Congress intended the reparations procedure to provide an inexpensive and expeditious remedy "analogous to * * * a small claims court." S. Rep. 95-850, 95th Cong., 2d Sess. 11, 16 (1978). Specifically, Section 14 of the CEA, 7 U.S.C. (& Supp. V 1981) 18,[1] provides that any person injured by a violation of the CEA or of CFTC regulations may apply to the Commission for an order directing the offender to pay reparations to the complainant. See 7 U.S.C. (& Supp. V 1981) 18(a) and (e). The parties are afforded a hearing before an Administrative Law Judge, whose decision is subject to review by the Commission. 7 U.S.C. (Supp. V 1981) 18(b) and (c). Final Commission orders are reviewable in the appropriate court of appeals. 7 U.S.C. 18(e).

The first regulations implementing the reparations procedure—regulations issued by the Commission when Section 14 became effective—provided that a party against whom a reparations complaint was brought may file a counterclaim "if it arises out of the transaction or occurrence or series of transactions or occurrences set forth in the complaint." 41 Fed. Reg. 3994, 4002 (1976); 17 C.F.R. 12.23(b)(2) (1976), now codified at 17 C.F.R. 12.19. This is a permissive counterclaim rule; it leaves a party free to proceed on his counterclaim in court, instead of before the CFTC, if he so chooses.

2. In February 1980, respondents Schor and Mortgage Services of America invoked the Commission's reparations jurisdiction by filing a complaint against ContiCommodity Services, Inc. and Richard L. San-

---

[1] Section 14 was amended in 1983 (see App., *infra*, 2a n.1), but those amendments are only indirectly material to this litigation. See pages 16-17 & note 13, *infra*.

dor, a Conti employee.[2] Conti is a commodity futures broker; Schor had an account with Conti and used the account to buy and sell commodity futures. Conti and Schor agreed that Schor's account contained a "debit balance" (App., *infra*, 54a)—that is, net trading losses and expenses (such as commissions) exceeded the deposits made in the account by Schor. But Schor asserted that the debit balance was the result of Conti's violations of the CEA. In particular, Schor alleged that Conti had failed to execute market orders that Schor had attempted to place, thus committing fraud prohibited by the CEA. Conti denied the allegations and filed a counterclaim seeking to recover the debit balance from Schor. Conti's counterclaim asserted that the debit balance resulted from Schor's trading and was therefore a simple debt owed by Schor. App., *infra*, 3a-5a, 45a.

The Administrative Law Judge, after conducting an evidentiary hearing, preliminarily ruled in Conti's favor on both the claim and the counterclaim. After this ruling, Schor for the first time challenged the Commission's statutory authority to adjudicate Conti's counterclaim. The ALJ then issued his decision, holding that Schor had failed to establish that Conti had violated the Act and awarding Conti the debit balance in the account (App., *infra*, 45a-55a). The Com-

---

[2] Two complaints, relating to separate trading accounts, were filed on behalf of Schor and the mortgage banking company, Mortgage Services of America, of which Schor was president and 90% shareholder. The complaints contained virtually identical allegations concerning Conti's conduct and were consolidated at the administrative level. The court of appeals also consolidated the two separate petitions for review of the Commission's final reparation order filed by Schor and Mortgage Services of America. We refer to Schor and Mortgage Services of America jointly as "Schor," and Conti and Sandor jointly as "Conti."

mission denied Schor's application for review of the ALJ's decision (App., *infra*, 42a-44a).

3. On June 28, 1983, Schor filed a petition for review of the Commission's order in the court of appeals. A few days before oral argument, the court of appeals, sua sponte, raised the question whether *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982)—in which this Court declared unconstitutional, under Article III, the adjudication of certain claims by the bankruptcy courts established by the Bankruptcy Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (see 28 U.S.C. (Supp. II 1978) 1471)—was relevant to the Commission's adjudication of Conti's counterclaims.

After briefing and argument on this issue, the court of appeals upheld most aspects of the Commission's ruling on Schor's claim (App., *infra*, 7a-11a)[3] but ordered the dismissal of Conti's counterclaims on the ground that "the CFTC lacks authority (subject matter competence) to adjudicate" common law counterclaims (*id.* at 3a). The court of appeals acknowledged (*id.* at 25a-26a n.24) the similarities between the CFTC's adjudicatory scheme and the form of administrative agency adjudication upheld in *Crowell* v. *Benson*, 285 U.S. 22 (1932), and it declined to attempt what it described as the "heraclean labor" of "rationalizing" this Court's relevant decisions (App., *infra*, 15a). Instead, the court of appeals stated that the Court's "latest Article III pronouncement—*Northern Pipeline, supra*—* * * generates doubt concerning the constitutionality of [the] Commission['s adjudication of counterclaims] sufficient to impel us to

---

[3] In one respect, the court of appeals vacated the Commission's rejection of Schor's claim and remanded for further proceedings (App., *infra*, 10a-11a). That aspect of the court of appeals' decision is immaterial here.

interpret the CEA as withholding from the Commission jurisdiction * * * over common law counterclaims" (*ibid.*)

a. The court of appeals first analyzed the CFTC's counterclaim jurisdiction according to the framework established in the plurality opinion in *Northern Pipeline*. The court ruled that CFTC adjudication of counterclaims "does not fit within" either "the Article III exception carved long ago for 'legislative courts' " (App., *infra*, 15a-17a (footnote omitted), quoting *Northern Pipeline*, 458 U.S. at 64 (plurality opinion)) or "the Article III court 'adjunct' accommodation" (App., *infra*, 16a); specifically, the court reasoned that the Commission's power to adjudicate counterclaims like Conti's cannot rest on the ground that the Commission functions as an "adjunct" of an Article III court because Article III courts are not free to reconsider the CFTC's factual findings de novo (App., *infra*, 21a-22a) and Article III judges do not control the appointment or removal of Commissioners or the reference of claims to the Commission (*id.* at 23a-24a).

The court of appeals then turned to, and rejected, the Commission's contention that Schor had effectively consented to CFTC adjudication of Conti's counterclaim against him. The Commission had pointed out that Schor had an implied right of action under the CEA (see *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, *supra*)[4] and therefore could have brought his claim against Conti in federal district court; the Commission contended that when Schor chose to bring his claim in the CFTC reparations proceeding instead, with full knowledge that the Commission would allow Conti to bring a counter-

[4] In 1983, Congress amended the CEA to provide expressly for private rights of action. See 7 U.S.C. 25.

claim arising out of the same transactions, Schor consented to CFTC adjudication of such a counterclaim.[5] The court of appeals questioned whether consent could establish the constitutionality of CFTC adjudication of Conti's counterclaim (see App., *infra*, 31a-32a), but it rejected the Commission's argument principally on the ground that "Schor has [not] manifested * * * unburdened assent to CFTC jurisdiction over Conti's counterclaims" (*id.* at 29a). The court of appeals reasoned as follows:

> [C]omplainants positioned as Schor [are faced] with this choice: File a reparations complaint with the Commission and "consent" to relinquish the right to have an Article III tribunal adjudicate the broker's related common law claims; or forgo the congressionally-established right to a Commission determination of a reparations complaint * * *. This is hardly * * * cost-free consent * * *.

Id. at 30a-31a (footnote omitted).

b. Having concluded that "[s]erious constitutional problems thus attend CFTC adjudication of common law counterclaims[,]" the court of appeals stated that the CEA did not manifest a "firm [congressional] intention regarding CFTC jurisdiction over common law counterclaims" and ruled that it would "adopt the construction of the Act that avoids significant constitutional questions" (App., *infra*, 33a). In determining that the CEA did not clearly authorize

---

[5] Indeed, Schor at one time sought dismissal of a suit by Conti for the debit balance in federal district court (see pages 19-20 note 15, *infra*) expressly because "[t]he reparations proceedings * * * will fully and completely resolve and adjudicate all of the rights of the parties to this action with respect to the transactions which are the subject matter of this action." Motion to Dismiss or Stay at 3, *ContiCommodity Services, Inc.* v. *Mortgage Services of America, Inc.*, No. 80 C 1089 (N.D. Ill.).

the CFTC to adjudicate counterclaims like Conti's, the court refused to defer to the CFTC's interpretation of the Act on the ground that the question whether the CEA authorizes adjudication of counterclaims by the CFTC is a "statutory interpretation-jurisdictional question * * * [of] precisely the kind with which courts customarily deal" (App., *infra*, 37a), not a " 'matter[] within the agency's expertise' " (*ibid.*; citation omitted). The court also noted that the Commission had once issued a *proposed* regulation that permitted only a narrower class of counterclaims to be brought in the reparations forum; even though that regulation was never adopted, the court of appeals concluded on this basis that "[t]he CFTC has not maintained a consistent position on the scope of its authority to adjudicate counterclaims" (*id.* at 36a).

The court below recognized that at the time Schor brought his reparations claim, the text of the CEA explicitly referred to counterclaims (7 U.S.C. (1976 ed.) 18(d)) and contemplated that the CFTC might award reparations against the complainant (7 U.S.C. (1976 ed.) 18(f) and (g)). But the court viewed these as "cryptic" provisions that did not supply any "bright signal of * * * congressional design" (App., *infra*, 34a, 35a); the court stated that "Congress might have contemplated counterclaims only * * * of a narrow compass" (*id.* at 34a).[6] Finally, the court of appeals acknowledged (*id.* at 39a) that the House report accompanying the 1974 amendments to the CEA—the amendments that established the repa-

[6] Specifically, the court of appeals suggested that the CFTC has authority to resolve only counterclaims based on the CEA itself. See, *e.g.*, App., *infra*, 34a-35a. As we explain (see pages 17-18 & n.14, *infra*), these suggestions ignore both the text and legislative history of the CEA and the realities of the administration of the reparations scheme.

rations procedure—explicitly stated that "[c]ounterclaims will be recognized in [reparations] proceedings * * * on such terms and under such circumstances as the Commission may prescribe by regulation" (H.R. Rep. 93-975, 93d Cong., 2d Sess. 23 (1974)); but the court dismissed this statement as a "fragment[] of legislative history" that could not manifest congressional intent because "it would be extraordinary for a legislature to deliver such a blank check to an administrative tribunal" (App., *infra*, 39a-40a).

4. The court of appeals denied rehearing en banc by a divided vote. In a dissenting statement, Judge Wald, joined by Judge Starr, urged that rehearing be granted because the panel's holding would "result[] in a serious evisceration of a congressionally crafted scheme for compensating victims of Commodity Futures Trading Act * * * violations" and would "decimate[]" this "faster and less expensive alternative forum" (App., *infra*, 62a). Judge Wald determined that "there is no doubt" that "Congress *expressly* meant to convey * * * jurisdiction" over counterclaims like Conti's to the Commission, and that "[t]o suggest otherwise is to blink reality" (*ibid.* (emphasis in original)). Judge Wald also indicated that she considered the Commission's consent argument to be substantial, noting that "[p]etitioners to the CFTC forum, like Schor[], plainly take notice of the counterclaim risk. Moreover, CFTC petitioners presently enjoy a private right of action under the [CEA] in federal courts" (*id.* at 63a). Judge Wald concluded as follows (*id.* at 63a-64a):

> In sum, this is, so far as I know, the first major extension of [*Northern Pipeline*] to a congressionally created compensation scheme enacted as an alternative to court adjudication in a special-

ized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant. The panel's reasoning has fatal implications for other alternative administrative forums to the courts in specialized areas.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is in error, and it severely undermines the decade-old CFTC reparations program—a program that was designed by Congress and that has, since its inception, received more than 8,000 claims that could otherwise have been brought in court.[7] Although the court of appeals purported to rest its decision on statutory grounds, it failed to adduce any evidence that Congress intended to preclude the CFTC from adjudicating counterclaims arising out of the same series of transactions as a reparations claim properly brought before it. On the Article III issues, the court below manifestly erred in concluding that Schor did not give effective consent to CFTC adjudication of Conti's counterclaims; especially because the CFTC reparations procedure deals with only a specialized category of cases, such consent is more than sufficient to establish the validity, under Article III, of CFTC adjudication of state law counterclaims. Because the court of appeals has, on the basis of an erroneous constitutional analysis, seriously jeopardized an important congressional program and heightened the uncertainty that attends ongoing efforts to design non-

[7] See 1984 CFTC Ann. Rep. 113; 1983 CFTC Ann. Rep. 27; 1982 CFTC Ann. Rep. 33; 1981 CFTC Ann. Rep. 40; 1980 CFTC Ann. Rep. 28; 1979 CFTC Ann. Rep. 30; 1978 CFTC Ann. Rep. 109; 1977 CFTC Ann. Rep. 71; 1976 CFTC Ann. Rep. 87.

judicial forums for the resolution of disputes, further review is warranted.

1. The court of appeals' approach, if it were to prevail, would do more than preclude the Commission from entertaining nearly all counterclaims; as Judge Wald accurately stated, it would "eviscerat[e]" the reparations program as a whole. The controversy between Schor and Conti is typical of the disputes that give rise to a reparations claim. Routinely, in CFTC reparations proceedings, a customer and a commodity broker agree that the customer's account contains a debit balance. The customer brings a reparations claim, asserting that the broker created the debit balance by violating the CEA; frequently, the broker counterclaims, asserting that the customer simply owes it the debit balance. In such cases, as the Commission explained in a decision in which it affirmed its authority to resolve counterclaims, the counterclaim "arises out of precisely the same course of events" as the principal claim and requires the resolution of many of the same disputed factual issues. *Friedman* v. *Dean Witter & Co.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,307, at 25,538 (Nov. 13, 1981).

Under the Commission's regulation, such a dispute can be resolved, in its entirety, in the administrative forum. Under the court of appeals' approach, the counterclaim can be adjudicated only in a state or federal court. But while the court of appeals' approach would theoretically still permit the customer's claim to be adjudicated by the CFTC, its practical result will be, in all likelihood, to force the entire dispute into court. That is because a broker who cannot bring his claim against a customer before the Commission will necessarily have to proceed against the customer in court. The customer may then be forced

by a compulsory counterclaim rule like Fed. R. Civ. P. 13(a) to file his claim against the broker in the same court; more important, even if a compulsory counterclaim rule does not apply, the customer—who is often an individual proceeding pro se [8]—is unlikely to be willing to bear the expense of litigating the same factual issues in two forums.[9]

Indeed, it is the Commission's judgment that if the court of appeals' approach were to prevail, potential reparations claimants—knowing that a counterclaim will force them into court in any event—will often forgo bringing their reparations claim before the Commission in the first place and will proceed directly to court.[10] In short, because the parties have an interest in resolving the entire dispute in one forum—and are sometimes legally required to do so by compulsory counterclaim rules—to preclude the CFTC from adjudicating counterclaims is, in many in-

---

[8] The Commission's experience is that more than 50% of reparations complainants proceed pro se. See generally *Rosenthal & Co.* v. *CFTC*, 614 F.2d 1121, 1123 (7th Cir. 1980).

[9] Moreover, the Commission will ordinarily not proceed on a reparations complaint against a broker if the broker's claim against the customer for the debit balance is pending in a court that has a compulsory counterclaim rule. See *Misasi* v. *Paine, Webber, Jackson, & Curtis, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,351, at 25,663 (CFTC Dec. 30, 1981).

[10] In fact, Schor himself sought dismissal of the district court action brought by Conti (see pages 19-20 note 15, *infra*; page 7 note 5, *supra*) on the ground that a reparations proceeding was pending and that "[t]he continuation of the [court] action * * * would be unjust to [Schor] in that it would require [him] at a great cost and expense, to litigate the same issues in two forums." Motion to Dismiss or Stay, note 5 *supra*, at 4.

stances, to bar it from playing any role whatever in resolving the dispute.[11]

Analogous considerations have been thought sufficient to give federal district courts ancillary jurisdiction over counterclaims arising from the same transaction or occurrence as a claim properly brought in federal court (see Fed. R. Civ. P. 13(a)) even when there is no independent basis for federal jurisdiction over the counterclaim. That is, federal courts have jurisdiction over such a counterclaim because litigants who have a right to proceed in federal court would be deterred from doing so if the entire controversy could not be resolved there. See generally *Moore* v. *New York Cotton Exchange*, 270 U.S. 593, 610 (1926); Mishkin, *The Federal "Question" in the District Courts*, 53 Colum. L. Rev. 157, 167 (1953). The concerns that justify extending federal courts' ancillary jurisdiction to counterclaims arising from the same transaction or occurrence as the principal claim likewise support the determination that the Commission's reparations jurisdiction should include a comparable, limited category of counterclaims.

2. Although the court of appeals purported to rest its decision on statutory grounds and not finally to resolve any constitutional question, the holding that Congress did not authorize the Commission to entertain counterclaims like Conti's is, in our view, transparently erroneous. Congress conferred "broad rule-

---

[11] This result would also deprive the Commission of an additional tool for policing the commodities industry: for example, reparations complaints are reviewed for possible investigation and law enforcement action by the Commission's Division of Enforcement. See 7 U.S.C. 15. See *Myron* v. *Hauser*, 673 F.2d 994, 1005 (8th Cir. 1982) ("[I]n a functional sense * * * [the reparation proceeding is] between the government and the commodity * * * broker, the party subject to government regulation.").

making powers" on the CFTC. *Rice* v. *Board of Trade*, 331 U.S. 247, 252 (1947). Indeed, Congress's grant of authority to the Commission is phrased in particularly sweeping terms; the Commission is authorized "to make and promulgate such rules and regulations as, in the judgment of the Commission, are reasonably necessary to effectuate any of the provisions *or to accomplish any of the purposes of* [the CEA]." 7 U.S.C. (1976 ed.) 12a(5) (emphasis added). See also H.R. Rep. 93-975, 93d Cong., 2d Sess. 22 (1974) (noting that the CFTC is "expect[ed] * * * to publish regulations" implementing the reparations procedure). Since, as we explained above, excluding counterclaims that arise from the same transaction would undermine the entire reparations procedure, there can be no doubt that the Commission acted within its authority when it issued a regulation permitting such counterclaims to be brought in reparations proceedings.[12]

---

[12] The court of appeals asserted that the CFTC's interpretation of the statute it is charged with administering is not entitled to deference because the Commission "has not maintained a consistent position on the scope of its authority to adjudicate counterclaims" and because "the question * * * is not one on which a specialized administrative agency, in contrast to a court of general jurisdiction, has superior expertise" (App., *infra*, 36a).

As we have noted, however, the CFTC issued the counterclaim rule currently in force at the time the reparations program first took effect; the rule has been the same throughout. The only "inconsistency" identified by the court of appeals was a *proposed* rule, published by the Commission for notice and comment, that would have allowed a much narrower class of counterclaims. 40 Fed Reg. 55666, 55667, 55672-55673 (1975). But a proposed regulation, of course, does not represent an agency's considered interpretation of its statute; an agency is entitled to consider alternative interpretations before settling on the view it considers most sound without relinquishing the deference Congress intended it to

The Commission's counterclaim rule is, in any event, supported by more than the breadth of its rulemaking power and the reasonableness of its rule. There are unmistakable indications that when Congress established the reparations procedure, it intended to grant the CFTC not just broad regulatory powers in general but, specifically, broad authority to issue a regulation authorizing counterclaims. The House report on the legislation that established the reparations procedure explicitly stated that the Commission is to exercise such authority (H.R. Rep. 93-975, *supra*, at 23):

> Counterclaims will be recognized in [reparations] proceedings but on such terms and under such circumstances as the Commission may prescribe by regulation. It is the intent of the Committee that the Commission will promulgate appropriate regulations to implement this section.

---

be accorded. It would obviously be antithetical to the purposes of the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553, to tax an agency with "inconsistency" whenever it circulates a proposal that it has not firmly decided to put into effect and that is subsequently modified in response to public comment.

The court of appeals also asserted (App., *infra*, 37a) that whether the CFTC can entertain counterclaims like Conti's is a "statutory interpretation-jurisdictional question" on which the courts, not the agency, are expert. It is unclear what the court of appeals meant by this assertion. Courts are, of course, required to defer to agencies on questions of "statutory interpretation" when the statute is one that the agency is charged with administering. See, *e.g.*, *Chemical Manufacturers Ass'n* v. *Natural Resources Defense Council, Inc.*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9. And issues concerning the nature of the counterclaim rule that would best serve the purposes of the reparations scheme are obviously questions on which the CFTC, not the courts, has superior expertise.

In addition, the text of Section 14, which established the reparations forum, refers on numerous occasions to "the complainant" or the "person complaining" (see, *e.g.*, 7 U.S.C. (& Supp. V 1981) 18(a), (d) and (e)) and to "the respondent" (see, *e.g.*, 7 U.S.C. (& Supp. V 1981) 18(a), (b), (c), (d), and (e)); but it carefully specifies that enforcement of an order awarding reparations may be sought by "the complainant, *or any person for whose benefit such order was made*" (7 U.S.C. (1976 ed.) 18(f) (emphasis added)) and that review of a reparations order may be sought by "*any party* aggrieved thereby" (7 U.S.C. (1976 ed.) 18(g) (emphasis added)). The most likely explanation of the review provision, and the only possible explanation of the enforcement provision, is that Congress envisioned that counterclaims would be permitted in reparations proceedings. Further, Section 14 requires nonresident complainants to post a bond to secure not just "the payment of costs, including a reasonable attorney's fee for the respondent if the respondent shall prevail" but also payment of "any reparation award that may be issued by the Commission against the complainant *on any counterclaim* by respondent" (7 U.S.C. (1976 ed.) 18(d) (emphasis added)). Finally, subsequent legislative developments demonstrate that Congress has ratified the Commission's counterclaim rule.[13]

---

[13] Congress amended Section 14 in 1978 (Futures Trading Act of 1978, Pub. L. No. 95-405, § 21, 92 Stat. 875); at that time, it expressed no disagreement with the CFTC regulation —which, as we noted, was issued at the same time that the reparations procedure took effect—that asserted jurisdiction over all counterclaims arising out of the same transactions as the reparations claim. See, *e.g.*, *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 535 (1982); *Merrill Lynch*, 456 U.S. at 381-382 & n.66.

In 1983, Congress again amended Section 14; the legislative deliberations preceding the amendments reveal that it was

The court of appeals responded to this abundant evidence of congressional intent to permit the CFTC to regulate its own counterclaim jurisdiction by asserting that Congress might have intended to allow the Commission to permit a narrower class of counterclaims, such as counterclaims arising under the CEA itself. See *e.g.*, App., *infra*, 34a, 35a. This is no more than unsubstantiated speculation on the part of the court of appeals; the court cited no evidence whatever that Congress intended to limit the CFTC's authority in this way.[14] The Commission was given broad powers to effectuate the provisions and

---

universally understood that "the reparations program seeks to pass upon the whole controversy surrounding each claim, including counter-claims arising out of the same set of facts" (H.R. Rep. 97-565, 97th Cong., 2d Sess. Pt. I, at 55 (1982); accord, S. Rep. 97-384, 97th Cong., 2d Sess. 49 (1982); 128 Cong. Rec. S13077 (daily ed. Oct. 1, 1982) (statement of Sen. Helms); *Commodity Futures Trading Commission Reauthorization: Hearings on S. 2109 Before the Subcomm. on Agricultural Research and General Legislation of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 97th Cong., 2d Sess. 302 (1982) (statement of Philip McB. Johnson, Chairman, CFTC); *CFTC Reauthorization: Hearings on H.R. 5447 Before the Subcomm. on Conservation, Credit, and Rural Development of the House Comm. on Agriculture*, 97th Cong., 2d Sess. 117 (1982) (statement of Philip McB. Johnson). The 1983 amendments explicitly authorized the CFTC to promulgate rules that "may prescribe, * * * without limitation * * * the nature and scope of * * * counterclaims" (7 U.S.C. 18(b)).

[14] The court of appeals' suggestion that the CFTC's counterclaim jurisdiction might extend only to counterclaims alleging violations of the CEA also ignores the fact that such claims essentially never arise. As the Commission advised the court of appeals in its rehearing petition, only one such counterclaim was ever brought in a reparations action—and it did not state a cognizable claim under the CEA. For the most part, the prohibitions of the CEA that might give rise to claims for damages simply do not apply to customers.

purposes of the CEA; there are unmistakable indications that Congress expected the CFTC to issue a regulation permitting counterclaims in reparations cases; nothing in the text or the legislative history of the CEA suggests that Congress intended to limit the CFTC's power to issue a regulation authorizing counterclaims; and the court of appeals did not question that the counterclaim regulation issued by the CFTC is reasonably necessary to accomplish the purposes of the reparations scheme established by Congress. In these circumstances, there is simply no basis for the court of appeals' decision to attribute to Congress a desire to preclude the regulation that the Commission issued. "The canon favoring constructions of statutes to avoid constitutional questions does not * * * license a court to usurp the policy-making and legislative functions of duly-elected representatives" or of the expert agencies the legislature has created to help carry out its will. *Heckler* v. *Mathews*, No. 82-1050 (Mar. 5, 1984), slip op. 12. In the final analysis, therefore, the only justification that the court of appeals advanced for limiting the CFTC's counterclaim jurisdiction was not Congress's intentions, but the court's own constitutional concerns.

3. Judge Wald summarized the reasons why CFTC counterclaim jurisdiction is constitutional when she noted that CFTC reparations proceedings are "a congressionally created * * * alternative to court adjudication in a specialized financial area in which federal jurisdiction is primary, in which the common law counterclaims are incidental and arise out of this main jurisdiction, and in which access to the adjudicative forum is by consent and choice of the complainant" (App., *infra*, 63a-64a). The court of appeals ruled, however, that Schor had not effectively consented to the adjudication of Conti's counterclaim

(*id.* at 29a-31a); that Schor's consent alone, in any event, would not be sufficient to sustain the constitutionality of Commission adjudication of the counterclaim (*id.* at 26a-28a, 31a-33a); and that the specialized nature of CFTC reparations jurisdiction, and the fact that the state law claims entertained by the CFTC are only ancillary to the federal claims that the Commission is undisputedly entitled to resolve, are not sufficient to establish the constitutionality of CFTC adjudication of counterclaims. On each of these points, the court of appeals erred.

a. The court of appeals' ruling that Schor did not effectively consent to the adjudication of Conti's counterclaim is plainly incorrect. As this Court held in *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran, supra*, Schor could have brought suit against Conti in federal district court on his claim that Conti violated the CEA. Instead, Schor chose to litigate that claim in a reparations action before the Commission.[15] When he decided to proceed in this way, Schor was unquestionably aware that under CFTC regulations, Conti could bring its state law counterclaim against him in the same, non-Article III forum. See note 15, *supra*.

---

[15] Indeed, at one point Schor *did* bring his claim against Conti in federal court; but he sought to avoid judicial resolution of his dispute with Conti for the express reason that he preferred to have it resolved in the CFTC reparations forum. Before receiving notice that Schor had commenced the reparations proceeding, Conti had filed a diversity action to recover the debit balance. *ContiCommodity Services, Inc.* v. *Mortgage Services of America, Inc.*, No. 80C1089 (N.D. Ill.). Schor filed a counterclaim in that action, alleging that Conti had violated the CEA. Schor also moved to dismiss or stay the district court action on the ground that the reparation proceeding was a prior pending proceeding in which the claims of both Schor and Conti could be fully adjudicated and that Conti's debit balance action was subject to an agreement to

The court of appeals ruled that Schor's voluntary and intelligent decision to proceed before the Commission did not constitute effective consent to the adjudication of Conti's counterclaim by the CFTC because Schor's consent was not "cost-free" (App., *infra*, 31a); the court reasoned that the only way Schor could avoid the adjudication of Conti's counterclaim by a non-Article III forum was to incur the "costs" of forgoing the convenience of having his own claim determined in that forum. This reasoning is obviously fallacious: it would lead to the conclusion that no party's consent to a non-Article III proceeding is ever effective. Any party who consents to such a proceeding does so because he perceives some advantage in doing so—usually that the non-Article III proceeding will be less expensive and more convenient. But it certainly does not follow that if such a party does not prevail he may attack the adverse result by asserting that his consent was not "cost-free." Con-

---

See page 7 note 5 supra.

arbitrate disputes. (Conti then voluntarily dismissed the federal court action and presented its debit balance claim as a counterclaim in the Commission's reparation proceeding. Thus Schor not only knowingly chose to have Conti's claim against him litigated before the CFTC instead of in an Article III court; he actively sought that result.

The court of appeals intimated (App., *infra*, 31a n.27) that since when Schor instituted his reparations action, *Merrill Lynch* had not yet been decided, Schor may have been unaware that he could have sought relief in federal district court. As we have just explained, there is no question that Schor deliberately chose to forgo resort to an Article III forum, choosing to proceed before the Commission instead. But in addition, the Seventh Circuit (the circuit in which Schor and Conti filed their district court claims) had confirmed in 1977 that there is an implied private right of action under the CEA. See *Hirk* v. *Agri-Research Council, Inc.*, 561 F.2d 96, 103 n.8.

gress established a forum for the resolution of certain disputes between commodity brokers and their customers, and the CFTC, acting, as we have shown, pursuant to congressional authorization, determined that once a dispute was lawfully brought before that forum, the *entire* dispute could be adjudicated. Schor, knowing that the Commission intended to adjudicate the entire dispute—Conti's counterclaim as well as his claim—freely decided to proceed before the Commission instead of in court. This was plainly valid and effective consent.

The court of appeals' ruling that Schor did not effectively consent to CFTC adjudication of the counterclaim against him is also flatly inconsistent with the reasoning of several of this Court's decisions. In *McElrath* v. *United States*, 102 U.S. 426 (1880), for example, the plaintiff sued the government in the Court of Claims and, when judgment was awarded against him on the government's counterclaim, asserted that he had been denied his Seventh Amendment right to a jury trial. The Court decisively rejected this contention (102 U.S. at 440):

> Congress, by the act in question, [has] informed the claimant that if he avails himself of the privilege of suing the government in the special court organized for that purpose, he may be met with a set-off, counter-claim, or other demand of the government, upon which judgment may go against him, without the intervention of a jury, if the court, upon the whole case, is of opinion that the government is entitled to such judgment. If the claimant avails himself of the privilege thus granted, he must do so subject to the conditions annexed by the government to the exercise of the privilege. Nothing more need be said on this subject.

It follows *a fortiori* from *McElrath* that Schor's consent was effective, because Schor, unlike the plaintiff *McElrath*, was not faced with a choice between exposing himself to a counterclaim and abandoning his claim entirely. See also *Katchen* v. *Landy*, 382 U.S. 323, 335 (1966); *Alexander* v. *Hillman*, 296 U.S. 222, 241-242 (1935).

b. The court of appeals suggested that even if the parties had effectively consented to having the CFTC adjudicate the counterclaim, Article III might still prohibit the CFTC from doing so. See App., *infra*, 26a-28a, 31a-33a. But we know of no case in which this Court has held that, when the parties to a dispute voluntarily agree to its resolution in a non-Article III forum, the Constitution prohibits the judicial enforcement of the decision reached in that forum. Each of the opinions in *Northern Pipeline* suggests that the Court's holding in that case is limited to circumstances in which the parties have not consented to a non-Article III adjudication.[16] Justice Rehnquist's concurring opinion, which reflected the views of Justices whose votes were necessary to constitute a majority in favor of the Court's holding, was particularly explicit on this point (458 U.S. at 91; emphasis added):

> I would, therefore, hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit *over Marathon's objection* to be violative of Art. III * * *.

Moreover, the legal determinations of the CFTC in reparations cases are subject to de novo review by

---

[16] See, *e.g.*, 458 U.S. at 80 n.31 (plurality opinion); *id.* at 92 (Burger, C.J., dissenting); *id.* at 95 (White, J., dissenting).

Article III courts; even the Commission's factual determinations are binding only if supported by the weight of the evidence. 7 U.S.C. 9, 18(e). This Court has long held that if the parties to a suit in federal court voluntarily submit their dispute to a non-Article III special master or referee—whose decisions are subject to appellate review that is, if anything, more deferential than the appellate review of CFTC decisions—the referee's decisions may be given the force of a court order. See, *e.g.*, *Kimberly* v. *Arms*, 129 U.S. 512, 524 (1889); *Heckers* v. *Fowler*, 69 U.S. (2 Wall.) 123, 133 (1865). Similarly, every court of appeals that has considered the question has upheld the constitutionality of 28 U.S.C. 636(c), which permits the reference of any civil case brought in federal district court, upon consent of the parties, to a non-Article III magistrate; [17] appellate review of the magistrate's determinations is again more deferential than the review of CFTC reparations orders.

c. Finally, we submit that the CFTC reparations procedure possesses characteristics that, even in the

---

[17] *Gairola* v. *Virginia Department of General Services*, 753 F.2d 1281 (4th Cir. 1985); *Fields* v. *Washington Metropolitan Area Transit Authority*, 743 F.2d 890, 893-895 (D.C. Cir. 1984); *Geras* v. *Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1045 (7th Cir. 1984); *Lehman Bros. Kuhn Loeb, Inc.* v. *Clark Oil & Refining Corp.*, 739 F.2d 1313, 1316 (8th Cir. 1984) (en banc), cert. denied, No. 84-519 (Jan. 14, 1985); *Puryear* v. *Ede's Ltd.*, 731 F.2d 1153, 1154 (5th Cir. 1984); ~~cert. denied, No. 83-1616 (Oct. 1, 1984);~~ *Collins* v. *Foreman*, 729 F.2d 108 (2d Cir. 1984), cert. denied, No. 83-1616 (Oct. 1, 1984); *Goldstein* v. *Kelleher*, 728 F.2d 32, 36 (1st Cir. 1984), cert. denied, No. 84-5 (Oct. 1, 1984); *Pacemaker Diagnostic Clinic, Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 547 (9th Cir. 1984), cert. denied, No. 83-1873 (Oct. 1, 1984); *Wharton-Thomas* v. *United States*, 721 F.2d 922, 929-930 (3d Cir. 1983). See also, *United States* v. *Dobey*, 751 F.2d 1140 (10th Cir. 1985).

absence of consent, would be sufficient to establish the constitutionality of Commission adjudication of a counterclaim like Conti's. Specifically, the reparations procedure resolves only claims arising in a narrow and highly specialized financial area, and the Commission entertains state law counterclaims only when those claims arise out of the transactions or events that gave rise to the federal claims that the CFTC is undisputedly authorized to adjudicate. For these reasons, the Commission's adjudication of counterclaims closely resembles the administrative adjudication upheld by this Court in *Crowell* v. *Benson*, 285 U.S. 22 (1932). But even if the Court disagrees with our submission that these characteristics are sufficient to establish the constitutionality of CFTC adjudication of counterclaims in the absence of consent, it is entirely clear that, when they are combined with Schor's consent, CFTC adjudication of counterclaims is consistent with Article III.

i. In *Crowell*, this Court rejected an Article III challenge to the non-consensual adjudication of claims under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, by the United States Employees' Compensation Commission, a non-Article III administrative body. There are few differences between the scheme upheld in *Crowell* and CFTC resolution of counterclaims, and none of them justifies a different result in this case.

The factual rulings of the Compensation Commission, like those of the CFTC, were reviewable by an Article III court but could be set aside only if not supported by the evidence (285 U.S. at 46); the legal rulings of the Compensation Commission, like those of the CFTC, were subject to de novo review (285 U.S. at 45). The subjects with which the Compen-

sation Commission and the CFTC deal—the workers' compensation claims of maritime employees and disputes arising out of commodities transactions, respectively—are both "specialized areas having particularized needs and warranting distinctive treatment" (*Palmore* v. *United States*, 411 U.S. 389, 408 (1973)). The CFTC—in its consideration of both claims under the CEA and counterclaims arising from the same transactions—resembles the Compensation Commission in that it has "the obvious purpose of * * * furnish[ing] a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task" (*Crowell*, 285 U.S. at 46).

The court of appeals ruled that the CFTC's counterclaim jurisdiction was at least presumptively inconsistent with Article III because it concerns private rather than public rights (App., *infra*, 17a-18a, 18a-19a). But that was true in *Crowell*, where the Court specifically stated that the case did not concern " 'public rights' " (285 U.S. at 50, quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856)) but was instead "one of private right, that is, of the liability of one individual to another under the law as defined" (285 U.S. at 51).

The only distinction between *Crowell* and this case—apart from the reparations' claimant's consent—is that the workers' compensation claims involved in *Crowell* arose under a federal statute, while the counterclaims adjudicated by the CFTC arise under state law. But this Court has held that a claim based on a contract may be adjudicated by a

non-Article III tribunal when it is ancillary to the resolution of a federal law dispute. *Reconstruction Finance Corp.* v. *Bankers Trust Co.*, 318 U.S. 163, 168-171 (1943). In any event, the significance of this supposed distinction between *Crowell* and this case is limited. As the Court explained in *Crowell*, the LHWCA merely modified the judge-made law of admiralty that would otherwise have governed the private dispute between employer and employee (see 285 U.S. at 39-42, 53-54); thus, it would be an overstatement to assert that *Crowell* involved purely statutory, not judge-made, law. At the same time, the debit balance counterclaims adjudicated by the CFTC are closely intertwined with federal statutory issues arising under the CEA: the counterclaims arise out of the same facts as the federal claim; the principal defenses to the state law claim will almost invariably constitute allegations of violations of the federal statute; and the contracts giving rise to those claims are subject to Congress's broad grant of regulatory jurisdiction to the Commission.[18]

ii. The court of appeals made no attempt to explain how its conclusion about the constitutionality of CFTC adjudication of counterclaims could be reconciled with *Crowell*. The court of appeals treated

---

[18] Congress has vested the Commission with "exclusive jurisdiction" to regulate commodity futures transactions and with expansive rulemaking authority. 7 U.S.C. 2, 12a(5). The Commission thus has the power to regulate the agreements between commodity brokers and their customers that give rise to debit balance claims, and has exercised that authority in certain respects. For instance, the Commission's regulations prohibit brokers from including in customer agreements any provision guaranteeing the customer against loss. 17 C.F.R. 1.56. Furthermore, the Commission regulates the disclosure and arbitration provisions contained in customer agreements. 17 C.F.R. 1.55, 180.3.

the plurality opinion in *Northern Pipeline* as controlling authority on the Article III question, but the court acknowledged that CFTC adjudication of state law counterclaims does "not exhibit all of the Article III flaws the *Northern Pipeline* plurality discovered in the 1978 Bankruptcy Act." App., *infra*, 25a n.24. In fact, the plurality in *Northern Pipeline* was careful to reconcile its conclusion with *Crowell*; the way in which the *Northern Pipeline* plurality did so demonstrates that CFTC adjudication of counterclaims far more closely resembles the functions of the Compensation Commission than it does those of the bankruptcy judges under the 1978 Act.

Unlike the bankruptcy judges, the CFTC deals only with a highly "particularized area of law" (*Northern Pipeline*, 458 U.S. at 85); the state law claims that it entertains arise from the same commodity futures transactions that give rise to federal claims in that particularized area and often require the resolution of the same factual issues as the federal claims.[19] The CFTC "engage[s] in statutorily channeled fact-finding functions" and "possess[es] only a limited power to issue compensation orders pursuant to specialized procedures" (*ibid.*); unlike the bankruptcy judges, it does not exercise "all ordinary powers of district courts" (*ibid.*). CFTC orders are reviewable under a standard comparable to that which applied in *Crowell*, not under the "clearly erroneous" stand-

---

[19] Indeed, the CFTC's counterclaim jurisdiction, unlike the jurisdiction of bankruptcy judges, "can be * * * characterized as merely incidental to" its function of resolving disputes under federal law (*Northern Pipeline*, 458 U.S. at 80 n.31 (plurality opinion)). The CFTC, unlike the bankruptcy courts under the 1978 Act, does not "entertain a wide variety of cases" (*id.* at 54), a "broad range of questions" (*id.* at 74), or "the entire range of federal and state controversies" (*id.* at 75 n.28).

ard applicable to the determinations of the bankruptcy judges (see *ibid.*). And a party must seek enforcement of CFTC orders in court; unlike the bankruptcy judges, the CFTC cannot enforce its own orders (see *id.* at 85-86).

4. The CFTC reparations program was created by Congress for the express purpose of providing a convenient alternative to litigation in the courts. *Merrill Lynch*, 456 U.S. at 384; S. Rep. 95-850, 95th Cong., 2d Sess. 11, 16 (1978). Congress has shown its continued concern for the reparations program by twice amending Section 14 to adjust the program and make it more effective. See pages 16-17 note 13, *supra*. As we have explained, the court of appeals' approach, if it were to prevail, would have a dramatic—indeed, in the Commission's judgment, a devastating—impact on the reparations program: if brokers' counterclaims must be brought in court, customers will be forced to forgo the reparations program and bring their federal statutory claims in court as well, unless, of course, the expense of judicial proceedings simply deters them from pursuing those claims at all.

Because the court of appeals has, on constitutional grounds, severely impaired the operation of an important program established by Congress, its decision warrants further review. Cf. 28 U.S.C. 1252.[20] The potential implications of the court of appeals' decision extend beyond the CFTC reparations procedure, however. The extent of Congress's authority, under the Constitution, to establish non-judicial means of

---

[20] As we have demonstrated, although the court of appeals' decision purported to rest on statutory grounds, there is in fact no question that Congress authorized the CFTC to entertain counterclaims like Conti's in reparations cases. See pages 13-18, *supra*.

resolving disputes is a question of very great current practical importance. In both Congress and the Executive Branch, considerable study has been given, and is now being given, to the possible creation of non-Article III forums for the adjudication of the multitude of claims that arise in connection with federal programs and that would otherwise have to be litigated, at great expense and burden, in Article III courts. See, *e.g.*, Committee on Revision of the Federal Judicial System, U.S. Dep't of Justice, *The Needs of the Federal Courts* (1977). The decision in this case, by an influential court of appeals, warrants further review not only because of its effect on the CFTC's program but because it creates considerable uncertainty over the extent of congressional authority to design such alternatives and is therefore likely to interfere with the ongoing efforts in this area.[21]

---

[21] The absence of a conflict in the circuits should not deter the Court from reviewing a decision that undermines, on constitutional grounds, a significant federal program. Moreover, under the CEA, review of a CFTC order must be sought in the court of appeals "for any circuit in which a hearing was held, or if no hearing was held, any circuit in which the appellee is located" (7 U.S.C. 18(e)). Consequently, continued litigation by the Commission of the constitutionality of its counterclaim jurisdiction in reparations cases would necessitate a distortion of the operation of the scheme established by Congress.

In any event, it is the Commission's judgment that this decision by the District of Columbia Circuit will create such uncertainty in the commodity futures industry that the reparations program will be seriously disrupted even if no other court of appeals addresses the constitutionality of the Commission's counterclaim jurisdiction. Indeed, in the Commission's view, it is somewhat doubtful that, even in cases that would be reviewed in other circuits, brokers will go to the expense of presenting counterclaims in reparations proceedings; the Commission expects that, because the decision below

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

KENNETH M. RAISLER
General Counsel

PAT G. NICOLETTE
Deputy General Counsel

WHITNEY ADAMS
Deputy General Counsel

NANCY E. YANOFSKY
Attorney

MARCH 1985

---

has cast doubt on the Commission's jurisdiction over counterclaims, brokers will simply bring suit in court in the first instance instead of taking the risk that a CFTC award on a counterclaim will later be set aside on Article III grounds.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10191